OFFICE OF THE ATTORNEY GENERAL
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OPINION

of

GEORGE DEUKMEJIAN
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RODNEY LILYQUIST, JR.
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No. CV 78/132

MARCH 1, 1979

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THE HONORABLE L. J. DEWALD, COUNTY COUNSEL OF PLACER COUNTY, has requested an opinion on the following question:

Are easements subject to the provisions of the Documentary Transfer Tax Act?

The conclusion is:

Easements are subject to the provisions of the Documentary Transfer Tax Act if they potentially may endure for a substantial period of time, such as perpetual easements, easements for life, and easements for a fixed period of years that can be renewed by the easement holders or are of sufficient length so as to approximate perpetual easements or easements for life.

## ANALYSIS

The Documentary Transfer Tax Act (Rev. & Tax. Code, §§ 11901-11935) 1/ allows counties and cities to impose a tax upon the written documents by which property interests are conveyed. Specifically, section 11911, subdivisions (a)

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1. All unidentified section references hereinafter refer to the Revenue and Taxation Code.

and (b), in part, authorize the imposition of a tax on each deed, instrument, or writing by which any lands, tenements, or other realty sold within the county or city shall be granted, assigned, transferred, or otherwise conveyed.

The question presented for analysis is whether the transfer of an easement constitutes the transfer of "lands, tenements, or other realty" within the purview of section 11911. We conclude that it does, depending upon the duration of the easement.

In determining the scope of section 11911, it is appropriate that we first examine the nature and character of an "easement." In general, an easement constitutes an intangible right to use, or to prevent the use of, land belonging to another. (Rest., Property, § 450; Wright v. Best (1942) 19 Cal.2d 368, 381; 10 Hagman & Maxwell, Cal. Real Estate Practice (1978) § 343.02, p. 343:6; 3 Miller & Starr, Current Law of Cal. Real Estate (1977) § 18.4, pp. 252-254; 1 Ogden's Revised Cal. Real Property Law (1975) § 13.1, p. 537; 3 Witkin, Summary of Cal. Law (8th ed. 1973), Real Property, § 340, p. 2040.) An easement holder's interest is protected against interference by others, including the owner and possessor of the burdened property. (10 Hagman & Maxwell, supra, § 343.02, p. 343:7; 1 Ogden's, supra, § 13.1, pp. 537-538.)

Easements may be created by express words of grant or reservation (usually by deed), by implication, by necessity, and by prescription (open, notorious, continuous, hostile to the owner, and exclusive use under a claim of right). (Cushman v. Davis (1978) 80 Cal.App.3d 731, 735; 10 Hagman & Maxwell, supra, § 343.01, p. 343:5; 3 Miller & Starr, supra, § 18.4, p. 252; 3 Witkin, supra, § 344, pp. 2043-2066.)

An easement that is "attached" to and benefits the land of the easement holder is termed "appurtenant"; the holder's land is called the "dominant tenement" and the land burdened by the easement is called the "servient tenement." (Civ. Code, §§ 801, 803; Cushman v. Davis, supra, 80 Cal.App.3d 731, 735; 10 Hagman & Maxwell, supra, § 343.04, pp. 343:9-343:12; 3 Miller & Starr, supra, § 18:5, p. 254; 1 Ogden's, supra, § 13.7, p. 541; 3 Witkin, supra, § 341, p. 2041; Cal. Real Estate Sales Transactions (Cont.Ed.Bar 1967) §§ 8.31, 8.35, pp. 303, 306 (hereinafter cited as "CEB").) An example of an appurtenant easement would be A's ability to benefit his own land by having the right to flood B's land.

An easement that does not benefit any particular land but rather belongs to the holder individually is termed an easement "in gross"; only a servient tenement would be

present in such circumstances. (Civ. Code, § 802; Cushman v. Davis, supra, 80 Cal.App.3d 731, 735; 10 Hagman & Maxwell, supra, § 343.05, pp. 343:12-343:13; 3 Miller & Starr, supra, § 18.6, p. 257; 1 Ogden's, supra, § 13.7, p. 541; 3 Witkin, supra, § 343, pp. 2041-2042.) An example of an easement in gross would be A's personal right to graze his cattle on B's land.

An easement may be a perpetual right in fee, a right for life or for a specific number of years, or a right conditioned upon the occurrence of some event. (Gerhard v. Stephens (1968) 68 Cal.2d 864, 881; 10 Hagman & Maxwell, supra, § 343.02, p. 343:6; 3 Miller & Starr, supra, § 18.4, pp. 252-253.)

Easements may be transferred in the same manner as they are created. The significant difference between an appurtenant easement and an easement in gross is that the former is transferred with the dominant tenement, even when not specifically mentioned, while the latter must be expressly transferred. (Civ. Code, §§ 1084, 1104; Franceschi v. Kuntz (1967) 253 Cal.App.2d 1041, 1045-1046; 10 Hagman & Maxwell, supra, §§ 343.05, 343.06, pp. 343:12-343:14; 3 Miller & Starr, supra, §§ 18:4, 18:5, pp. 252, 256; 1 Ogden's, supra, § 13.7, p. 541.)

Easements may be terminated by release or merger, abandonment or nonuse, prescription, incompatible acts of the easement holder, or destruction of the servient tenement. (Civ. Code, § 811; 10 Hagman & Maxwell, supra, § 343.02, p. 343:7; 3 Witkin, supra, §§ 373-380, pp. 2068-2074; CEB, supra, § 8.33, pp. 305-306.)

Based upon the foregoing characteristics, it readily can be observed that an easement, although it does not create "title" in the servient tenement or constitute an "estate," is an interest in land and is treated similarly to other interests in real property. (Gerhard v. Stephens, supra, 68 Cal.2d 864, 881; Johnson v. Ocean Shore Railroad Co. (1971) 16 Cal.App.3d 429, 434; City of Hayward v. Mohr (1958) 160 Cal.App.2d 427, 432; Balestra v. Button (1942) 54 Cal.App.2d 192, 197; 3 Miller & Starr, supra, § 18:4, p. 252; 1 Ogden's, supra, § 13.1, p. 537.)

Having determined that easements are interests in real property, we must consider whether the Legislature intended to include them within the phrase "lands, tenements or other realty" of section 11911. In interpreting the statute, we are required to "ascertain the intent of the Legislature so as to effectuate the purpose of the law." (Select Base Materials v. Board of Equal. (1959) 51 Cal.2d

640, 645; accord, Cossack v. City of Los Angeles (1974) 11 Cal.3d 726, 732.)

We have interpreted section 11911 on a number of occasions. (See 56 Ops.Cal.Atty.Gen. 79, 82 (1973); 53 Ops.Cal.Atty.Gen. 252, 255 (1970); 51 Ops.Cal.Atty.Gen. 55, 56-57 (1968); 51 Ops.Cal.Atty.Gen. 50, 52 (1968).) In each case, we looked to the administrative interpretation given to the statutory scheme imposing a federal stamp tax on conveyances (26 U.S.C. §§ 4361, 4363), after which the Documentary Transfer Tax Act was patterned. The federal act expired on the same date that section 11911 became operative (Jan. 1, 1968), and the statutory language under consideration is identical to the prior federal law. As we previously stated, "[u]nder such circumstances, it is reasonable to assume that the Legislature intended that the established federal construction of the language used be continued." (51 Ops.Cal. Atty.Gen., supra, at p. 57; see Scripps etc. Hospital v. Cal. Emp. Com. (1944) 24 Cal.2d 669, 677; State of California ex rel. Dept. of Employment v. General Ins. Co. (1970) 13 Cal.App.3d 853, 859, fn. 3.)

At the time section 11911 was enacted, the established federal construction of the term "realty" was as follows:

> "(a) Those interests in real property which endure for a period of time, the termination of which is not fixed or ascertained by a specific number of years, such as an estate in fee simple, life estate, perpetual easement, etc., and
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> "(b) Those interests enduring for a fixed period of years but which, either by reason of the length of the term or the grant of a right to extend the term by renewal or otherwise, consist of a bundle of rights approximating those of the class of interests mentioned in (a) of this subdivision." (26 C.F.R., § 47.4361-1(a)(4)(i) (1978).)

We note that the established federal construction does not recognize the substantial difference between appurtenant easements and easements in gross. Rather than look to the types of uses involved, the federal construction generally continues the historical distinction drawn between "real property" and "personal property"; a "freehold" interest in perpetuity or for life constitutes "real estate," while a "chattel" interest for a term of years constitutes only an "interest in" real estate. (See Callahan v. Martin (1935) 3 Cal.2d 110, 120; see also Gerhard v. Stephens, supra, 68 Cal.2d 864, 881; Appeal of N.B. & M.R.R. Co. (1867) 32 Cal. 499, 506; Roth v. Cottrell (1952) 112 Cal.App.2d 621, 625; 10 Hagman & Maxwell, supra, § 343.02, p. 343:6.)

Undoubtedly, the historical distinctions made in this area are rather artificial and antiquated. The federal construction allows for some flexibility, however, by classifying interests for a term of years as "realty" when such interests approximate an "ownership" right rather than a "mere temporary right of possession." (See Phillips Petroleum Co. v. Jones (10th Cir. 1949) 176 F.2d 737, 741; Jones v. Magruder (D. Mary. 1941) 42 F.Supp. 193, 198-200.) Nevertheless, the federal construction would allow certain valuable easement interests to be conveyed without coming within the provisions of the Documentary Transfer Tax Act, thereby undermining its revenue raising purpose.

Since, however, we have been unable to find any expression of legislative intent to support a contrary conclusion, we believe that the Legislature intended to follow the established federal construction of the term "realty."

The conclusion to the question presented, therefore, is that easements are subject to the provisions of the Documentary Transfer Tax Act if they potentially may endure for a substantial period of time, such as perpetual easements, easements for life, and easements for a fixed period of years that can be renewed by the easement holders or are of sufficient length so as to approximate perpetual easements or easements for life.

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